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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. [redacted] 88

SAM BERNSTEIN,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

SAM BERNSTEIN,
Petitioner.

SEYMOUR A. TERRELL,
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Cleveland, Ohio,
Of Counsel.

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TABLE OF CONTENTS.

Reference: No Opinion Below	1
Jurisdiction	1
Questions Presented	2
Part of Section of Article XIV of the Amendments to the Constitution of the United States Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	7
Appendices:	
A. Order of the Supreme Court Overruling Motion for Leave to Appeal	8
B. Application for Rehearing	8
C. Order of the Supreme Court Denying Application for Rehearing	10
D. Indictment	11
E. Revised Code 2917.01 (12823) (12824) Bribery	12
F. Journal Entry of the Court of Appeals	13

TABLE OF AUTHORITIES.

Cases.

Ayers v. Woodard, 166 O. S. 131	5
Cole v. Arkansas, 333 U. S. 196	5
Crobaugh et al. v. State of Ohio, 45 Ohio App. 41	10
Greene v. Briggs, 1 Curtiss 311 (U. S.)	4
Hewitt v. The State, 25 Texas 722	4
Maresette v. United States, 342 U. S. 246	6
Searles v. State, 3 Ohio Cir. Dec. 478	5

Sorrells v. United States, 287 U. S. 435 6
State v. Cook, 282 S. W. (2d) 533 5
State v. Martin, 260 S. W. (2d) 536 5
White v. State, 245 S. W. (2d) 704 4

Constitution.

Constitution of the United States, Fourteenth Amendment 2

Statutes.

Ohio Revised Code, Sec. 2917.01 3, 12
28 U. S. C. 1257(3) 1

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SAM BERNSTEIN,

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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered against the above petitioner, in a case in the Supreme Court of Ohio, entitled *State of Ohio vs. Sam Bernstein*,—No. 35,911, on March 4, 1959.

REFERENCE: No Opinion Below.

Neither the Supreme Court of Ohio nor the Court of Appeals of the Eighth Judicial District, Cuyahoga County, No. 24,584, rendered any opinions.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on March 4, 1959; application for rehearing was filed March 17, 1959, and denied March 25, 1959; a copy of the judgment of the Supreme Court of Ohio, the application for rehearing, and entry of denial of rehearing, and of judgment of affirmance of Cuyahoga County Court of Appeals are printed in Appendices A, B and C hereto, *infra*, pp. 8-10.

The jurisdiction is invoked under 28 U. S. C. section 1257 (3).

QUESTIONS PRESENTED.

Was the petitioner denied due process of law in violation of the Fourteenth Amendment of the Constitution of the United States by the circumstances that he was convicted of a felony under a criminal statute of Ohio when (1) the elements in the indictment were not proved or required to be proved under the charge of the Court of Common Pleas; (2) The Court of Common Pleas told the jury that "a defense of entrapment 'assumes' that the act charged was committed," thus depriving the defendant of trial by jury; (3) that though defendant was charged with both soliciting and accepting money to influence his action, the court held the failure to prove acceptance immaterial, thus allowing a conviction, though the charge was not proved in all its elements; (4) the charge of the Court burdening the defendant with the presumption which he must disprove, when no presumption exists or is to be charged under the circumstances, thus shifting the burden of proof from the State; and (5) requiring a conviction of the defendant if the jury found that the Igoes (persons claimed to have offered the bribe), had a purpose and intent to influence the defendant, when that was no part or element of the indictment;—to all of which prompt and due exception was taken through the courts.

PART OF SECTION OF ARTICLE XIV OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES INVOLVED.

"* * * (No State shall * * *) nor shall any State deprive any person of life, liberty, * * * without due process of law * * *."

STATEMENT OF THE CASE.

The petitioner was indicted in the Common Pleas Court of Cuyahoga County, Ohio, under Section 2917.01 of the Revised Code of Ohio, entitled "Bribery"—a copy of such indictment, of the statute upon which such indictment was predicated, and Journal Entry of Court of Appeals, appears in Appendices D, E and F, pp. 11-13, *infra*.

The petitioner and defendant was a building inspector of the City of Cleveland and the indictment charged in substance that he "did unlawfully and corruptly solicit and accept from Mable Igoe and Hugh Igoe, One Hundred Dollars ($100.00) to influence his action, opinion and judgment with respect to his official duties."

The evidence of the Igoes in substance was that the petitioner, as a building inspector came to their house because of a complaint that the Igoes had rented the third floor of their house, equipped with stove, kitchen and the means of full use as living quarters, and he told them what they needed to do in order to remedy the violation.

The Igoes promised to make the change so as to comply. He was to come back to see if the change had been made. He was put off to the 13th of September and when he came to make the inspection to see if compliance had taken place, he was told to come back on the 17th since the wife of Mr. Igoe was absent. In the meantime, the tenant had removed and compliance by disconnection had taken place. This, without informing the petitioner.

He came again on the 17th, being a day that the Igoes had arranged for the coming of detectives and contriving a bribery charge.

The detectives employed a device which would enable them to prove acceptance of the money if the petitioner took the money; namely, a specific powder placed

on such money so that whoever touches the same, his hands would show it. The detectives found, on his arrest and so testified, that there was nothing on his (the petitioner's) hands to indicate that he had ever taken any money, which taking he strenuously denied throughout.

The evidence showed that at all times the petitioner was only interested in having the Igoes comply. By complying, the Igoes lost the benefit of renting their third floor and thus came the motive to revenge themselves.

In spite of these facts, the petitioner was convicted.

The charge of the Court of Common Pleas violated due process as we will show below.

The petitioner was convicted and sentenced to the penitentiary.

On appeal to the Court of Appeals, Judge Hurd of the Court of Appeals dissented stating that there was error in the charge of the Court of Common Pleas. Appeal and Motion for Leave was overruled. Application for Rehearing filed and overruled. We shall show below that the existence of the error charged establish a denial of due process in petitioner's conviction.

REASONS FOR GRANTING THE WRIT.

We charge

1. The evidence shows that the petitioner did not accept any money from the prosecuting witness.

There is no basis for a conviction since the indictment had both elements as the basis for the charge. Acceptance was not proved. In 245 S. W. (2d) 704, Syl. 3, *White v. State*, it is held that both solicitation and acceptance of the money must be proved. A conviction on only part of the elements of the charge violates due process.

See 25 Texas 722, *Hewitt v. The State*, and 1 Curtiss 311 (U. S.) *Greene v. Briggs*, pages 325 and 326.

2. The Court charged the Jury "that if the object of its offering and payment (by the Igoes) was to influence the defendant in the performance of his official duties as a building inspector, the offence of bribery was complete," thus authorizing the Jury to convict for the intent and acts of the Igoes.

There is no statute in Ohio, and there was no charge in the indictment which authorized the alleged recipient of money to be convicted because of the intention and purpose of the alleged briber.

This was a violation of due process. See 333 U. S. 196, *Cole v. Arkansas,* where a writ of certiorari held petitioners stood convicted by the State Supreme Court under a criminal statute for violation of which they had not been charged, and the conviction was reversed. See also page 201 of that case.

3. The Court charged the Jury

> "it is a rule of law that every sane person intends the natural and probable consequence of his voluntary acts, unless the evidence is such as to show a lack of intent."

Thus the court made what, at most, would be a presumption of fact binding, and put on the defendant the burden to rebut, by evidence, such presumption.

Further, under the Ohio law and the decisions of other states, no presumption may be charged where there is evidence offered by both sides. See 3 Ohio Cir. Dec. 478, Syl. 15, *Searles v. State;* 45 Ohio App. 410, Syl. 3, *Crobaugh et al. v. State of Ohio,* page 417; 166 O. S. 131, *Ayers v. Woodard,* Syl. 3; 282 S. W. (2d) 533, *State v. Cook,* p. 535; 260 S. W. (2d) 536, *State v. Martin,* Syls. 2, 4, 7, 9, pages 541-546.

Such a charge violates due process. See 342 U. S. 246, *Maresette v. United States*, where the court said:

> "the trial court may not withdraw or prejudge the issue by instructing the Jury that the law raises a presumption of intent from a single act. * * *"

Further on page 275:

> "a presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish give to a proven fact an artificial and fictional effect."

Thus the petitioner was deprived of a jury trial and the burden placed on him instead of the state.

4. The Court charged the jury that because alleged entrapment may be in a case, therefore the guilt of the defendant (petitioner) is thereby to be assumed by the Jury. This is contrary to the decisions of the Supreme Court of the United States where a similar charge was given.

See 287 U. S. 435, *Sorrells v. United States*.

It was there held that it was wrong to claim that a defense of entrapment is an admission of guilt.

We submit that the above shows a departure in the record from due process.

CONCLUSION.

This cause illustrates the very evil, the jurisdiction of the Supreme Court of the United States was designed to remedy; namely, where circumstances exist under which a defendant who has committed no crime, or one not proved to be committed as was charged in the indictment, instructions to the Jury may not be allowed to operate to obtain such a result and a State by its Courts will not be allowed to deprive a petitioner of his liberties, for then the State has acted without due process of law.

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SAM BERNSTEIN,
Petitioner.

SEYMOUR A. TERRELL,
Of Counsel.

APPENDIX A:

Order of the Supreme Court Overruling Motion for Leave to Appeal.

Mar. 4, 1959:

It is ordered by the Court that this motion be, and the same hereby is, overruled.

APPENDIX B.

Application for Re-Hearing.

To the Honorable Judges of The Supreme Court of Ohio:

Appellant, in conforming with Rule XX of the Supreme Court of Ohio, hereby applies for a rehearing of his motion for leave to appeal, which was overruled, and decision of denial announced March 4, 1959, and respectfully represents that the decision and overruling of the motion for leave to appeal and the judgment thereon are erroneous for the following reasons:

1. Said decision and denial of leave and judgment thereon are contrary to 166 O. S. 131, *Ayers v. Woodward*, Syl. 3; 45 Ohio App. 410, Syl., *C. Crobaugh et al. vs. State of Ohio*; 133 Ohio S. 362, *State of Ohio v. DiAngelo*; 287 U. S. 435, *Sorrels v. United States*, and 245 S. W. (2d) 704, Syl. 3, *White v. State*; and 3 Ohio Cir. Dec. 478, *Searles v. State*.

2. The Common Pleas Court, and the Court of Appeals in affirming the judgment of conviction and sentence of

the defendant-appellant,—and thus the Supreme Court of Ohio, by overruling of the motion for leave to appeal from the judgment of the Court of Appeals, deprives the defendant-appellant of his liberty contrary to Art. I, Bill of Rights, paragraph 5, Constitution of Ohio and Art. I Section 10 thereof and Amendment XIV, Section 1 of the Constitution of the United States, and without due process of law,—and specifically in this, that the elements in the indictment were not proved or required to be proved, and likewise, that the Supreme Court of Ohio, by action overruling the motion for leave to appeal,—and thus affirming the judgment against, and conviction and sentence of the defendant-appellant, as aforesaid, sanctions convictions though (1) the Court told the jury that a defense of entrapment "assumes" that the act charged was committed, thus depriving the defendant of trial by jury; (2) that though defendant is charged with both soliciting and accepting money to influence his action, the failure to prove acceptance is immaterial, thus allowing a conviction though the charge is not proved in all its elements; (3) burdening the defendant with a presumption which he must disprove, when no presumption exists or is to be charged under the circumstances, thus shifting the burden of proof from the State, and (4) requiring conviction of the defendant if they found that the Igoes had a purpose and intent to influence the defendant when that is no part or element of the charge.

WHEREFORE, defendant-appellant respectfully prays that this application be granted.

TERRELL, WILLIAMS AND SALIM,
SEYMOUR A. TERRELL,

Attorneys for Defendant-Appellant.

APPENDIX C.

Order of the Supreme Court Denying Application for Rehearing.

Mar. 25, 1959:

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

APPENDIX D.

Indictment.

No. 68776

IN THE COURT OF COMMON PLEAS

CRIMINAL BRANCH.

STATE OF OHIO
CUYAHOGA COUNTY, SS.

In the September Term in the year of our Lord 1957, the jurors of the Grand Jury of the State of Ohio, within and for the body of the county aforesaid, on their oaths in the name and by the authority for the State of Ohio, Do find and present that Sam Bernstein on or about the 17th day of September 1957 at the County aforesaid, was a Building Inspector with the Building Department of the City of Cleveland, a Municipal Corporation and being then and there a duly authorized, qualified and acting inspector, officer, employee and agent of the City of Cleveland and with reference to matters pending and that might require coming before him as such inspector, officer, employee and agent of the said City of Cleveland did unlawfully and corruptly solicit and accept from Mabel L. Igoe and Hugh Igoe a sum of money in the amount of $100.00 to influence the action, opinion and judgment of the said Sam Bernstein with respect to his official duties in the enforcement of and in carrying out the laws of the State of Ohio and the charter provisions and ordinances of the City of Cleveland, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

JOHN T. CORRIGAN,
Prosecuting Attorney.

(Indorsed) a True Bill.

APPENDIX E.

Revised Code 2917.01 (12823) (12824) Bribery.

No person shall corruptly give, promise, or offer to a member or officer of the general assembly or to a state, judicial, or other officer, public trustee, or an agent or employee of the state or of such officer or trustee, either before or after his election, qualification, appointment, or employment, any valuable thing, or corruptly offer or promise to do any act beneficial to such person to influence him with respect to his official duty, or to influence his action, vote, opinion, or judgment, in a matter pending, or that might legally come before him. No member of the general assembly, or a state officer or other officer, public trustee, agent, or employee of the state or of such officer or trustee, either before or after his election, qualification, appointment or employment, shall solicit or accept any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion or judgment, in a matter pending, or that might legally come before him.

Whoever violates this section shall be imprisoned not less than one nor more than ten years. A person convicted under this section is disqualified from holding any public office or appointment under this state, and, if not a state officer, shall be removed from office or employment by order of the court.

APPENDIX F.

Journal Entry of the Court of Appeals.

Dated: December 29, 1958.

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the majority of the Court, Judge Lee E. Skeel and Judge Julius Kovachy, find no error prejudicial to the appellant (see R. C. 2945.83) and therefore the judgment of the Court of Common Pleas is affirmed, Judge Joy Seth Hurd dissenting for prejudicial error in the charge of the Court of Common Pleas. A careful reading of the bill of exceptions, including the charge given to the jury by the trial court, show that substantial justice has been done the party complaining, to which Judge Joy Seth Hurd, dissents.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts.